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HARVARD

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THE CLOG ON THE EQUITY OF REDEMPTION.

I.

THE problem of the clog on the equity of redemption is all but as old as the equity of redemption itself. Early in the seventeenth century it became clear at length beyond all doubt that the courts of equity were henceforth going to grant redemption of mortgaged property as a matter of course in all cases, even when there had been no deception or overreaching, — and this notwithstanding the absolute legal title which the mortgagee had now in the estate, according to the very terms of the conveyance, by the passing of the day on which the repayment was to be made. Nothing that the courts of equity have felt obliged to do since that time to protect their equity of redemption from inconsistent limitations upon it has been so violent an interference with the rights of parties to a mortgage to agree as they please, as the original interposition of the equity of redemption itself. In this light the rule against any clog on the equity is a necessary corollary of the principle of redemption.

II.

Yet ever since the establishment of the equity of redemption there have been lenders with an eye to the ultimate acquisition of the mortgaged estate casting about for some device to evade this bothersome intervention of equitable relief. The first attempts were, as always, crude enough. A covenant was inserted in the

mortgage deed by which the borrower agreed never to claim redemption after default on the day of payment. It is natural that the courts of equity should have taken great offense at this, although they dismissed such agreements easily enough. "If a man makes a mortgage and covenants not to bring a bill to redeem, nay, if he goes so far as in Stisted's Case to take an oath that he will not redeem, yet he shall redeem."[1] Nor is such naïveté confined to early days; such attempts appear at intermittent intervals in our reports down to present times. Of course they all come to the same end. When a bill for redemption is filed setting forth such a mortgage in its entirety, the court of equity takes hardly a moment in passing to repeat that such a stipulation is void as a clog upon the equity of redemption.[2]

In a somewhat modified form the attempt to restrict the equity is next made. Agreements are entered into permitting recourse to equity for redemption for some period, but working an extinguishment of the equity in due time. The earliest report we have of a case of this sort of thing is Howard *v.* Harris:[3] "Howard mortgages land, and the proviso for redemption was thus: provided that I myself, or the heirs males of my body, may redeem. The question was, whether his assignee should redeem it? And it was decreed, he should; for, if once a mortgage always a mortgage." It is needless to add that almost invariably like schemes have met a similar fate at the hands of the courts of equity.[4]

III.

We do not reach difficult cases until we have to deal with some reasonable business bargain in behalf of which some sensible legal

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[1] East India Co. *v.* Atkyns, Comyns 347, 349.

[2] It is unnecessary to cite many cases to the effect that an agreement never to apply for redemption after default is void. See the following cases in particular: Toomes *v.* Conset, 3 Atk. 261; Vernon *v.* Bethel, 2 Eden 110; Pugh *v.* Davis, 96 U. S. 332; Parmer *v.* Parmer, 74 Ala. 285; Jackson *v.* Lynch, 129 Ill. 72; Hart *v.* Burton, 7 J. J. Marsh. (Ky.) 322; Bayley *v.* Bayley, 5 Gray (Mass.) 505; Cherry *v.* Bowen, 4 Sneed (Tenn.) 415; Rogan *v.* Walker, 1 Wis. 527.

[3] 1 Vern. 33.

[4] The few cases following will be sufficient to illustrate the well-established rule that any arrangement contemporaneous with the mortgage for cutting short the equity of redemption is invalid. Price *v.* Perrie, 2 Freem. 258 (redemption to be during life of mortgagor); Bowen *v.* Edwards, 1 Rep. in Ch. *221 (no redemption after seven years); Spurgeon *v.* Collier, 1 Eden 55 (redemption to be during joint lives); Salt *v.* Marquis Northampton, [1892] A. C. 1 (redemption to be during life of mortgagor); Bradbury *v.* Davenport, 114 Cal. 593 (no redemption after four months after default); Stover *v.* Bounds, 1 Oh. St. 107 (no redemption after certain day fixed).

distinction may really be urged. We have, it seems, a case of a provision for cutting short an equity of redemption which really deserves serious consideration in Batty *v.* Snook.[1] It is difficult to abbreviate the facts in that case. There was a mortgage subsisting between the parties and other unsecured indebtedness. A partial settlement was made between the parties, leaving a balance of $2000 still due. In pursuance of an understanding the mortgage was cancelled and an absolute conveyance was made by the debtor to the creditor. By a contract dated the next day the grantee agreed to resell the premises, and the grantor agreed to repurchase them at the price of $2000 and interest to the day fixed for the completion of the purchase, with the provision that if the payment was not made on that day fixed then all rights should be lost. The court first satisfied itself that these arrangements were all part of one transaction; for if not, then, of course, by established law a provision in a contract of sale and purchase that time shall be of the essence would be respected more or less. So, convinced that what had really happened was an extension of the existing mortgage relation, Mr. Justice Manning concluded thus:

> "Once a mortgage always a mortgage may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee by which the equity of redemption is to be shortened or cut off. To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract would be a revival of the common law doctrine, using for that purpose two instruments, instead of one, to effect the object." [2]

It may be shown in this connection better than at some later time under what circumstances these principles become really inapplicable. Take by way of contrast the somewhat similar case of Davis *v.* Thomas.[3] In that case too there was an existing mortgage relation and the mortgagor made an absolute deed of release to the mortgagee. But in this case there was a subsequent conveyance for the proper consideration of £1800, which was made up of the mortgage debt thereby cancelled and the payment of an additional sum of money to the mortgagor. As part of the same

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[1] 5 Mich. 286.

[2] The cases in accord with this in principle are very numerous and are all to the same effect. See, for additional illustrations, Bradbury *v.* Davenport, 114 Cal. 593; Tennery *v.* Nicholson, 87 Ill. 264; Turpie *v.* Lowe, 114 Ind. 37; Linnell *v.* Lyford, 72 Me. 280; Mooney *v.* Byrne, 163 N. Y. 86; Wright *v.* Niles, 13 Vt. 341.

[3] 1 Russ. & M. 506.

transaction the mortgagee demised the estate to the mortgagor for a term of years with the proviso that in case the rent were regularly paid when due, the lessee should be at liberty to repurchase the estate from the mortgagor at the price of £1850 at any time within five years. The lessee defaulted in payment of his rental, but applied within five years to repurchase. But the Master of the Rolls said:

> "In all cases of the payment of money, where penalty or forfeiture is introduced for the purpose of security, there a court of equity will relieve against the penalty or forfeiture, upon the ground of full compensation by giving interest. But where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming that privilege must show that the money was paid accordingly."

Or, to cast the reasoning in another form, since there was no indebtedness left outstanding by this transaction, there was a real sale and not a persisting mortgage. It is only in a true mortgage that there is an equity of redemption with the protection of which the court is concerned at all. Mere options, on the contrary, die when their time comes.[1]

IV.

It is much the same problem in a more developed form when there is a stipulation in the mortgage that the mortgagee may purchase the interest of the mortgagor on such terms as are therein agreed. Such an option may be valuable; indeed it may be one of the considerations which induced the mortgagee to make the advance. Nevertheless such an arrangement has every presumption against it, as it is in effect a provision in the mortgage for the extinguishment of the equity of redemption. And as has been seen in various cases such schemes are altogether abhorrent to courts of equity upon general principle regardless of particular cases.

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[1] The cases similar to this in principle, holding that when it is clear that there has been simply a conditional sale there is no basis for any equity of redemption, are again innumerable. It will be sufficient to refer to the following illustrations: Conway *v.* Alexander, 7 Cranch (U. S.) 218; Flagg *v.* Mann, 2 Sumn. (U. S.) 533; Haynie *v.* Robertson, 58 Ala. 37; Spence *v.* Stedman, 49 Ga. 133; Hibernian Bank Ass'n *v.* Council Nat'l Bank, 157 Ill. 54; Robinson *v.* Cropsey, 2 Edw. Ch. (N. Y.) 138.

The leading case of this sort is undoubtedly *Re* Edward's estate.[1] An estate was mortgaged for an advance of £2500, and the proviso in the mortgage was that in case interest for one full year should be defaulted, then the mortgagee might purchase the mortgaged premises for such sum as with the sum of £2500 and interest then due thereon would make £4000. The question being raised in the Estates Court, Mr. Justice Hargreave held that the mortgagee got no rights by such an invalid provision. He said:

> "When the contract is part of the arrangement for the loan, and is actually inserted in the mortgage deed, it is presumed to be made under pressure, and is not capable of being enforced. If the land had fallen in value below £4000, Mr. Jackson would have insisted on being treated as a mortgagee; but, as it has risen, he says he is a purchaser; that is, he gets a collateral benefit over and above his principal and interest which a court of equity never permits. This contract is virtually a clause of foreclosure on a fixed day."

Although at times an undercurrent of opposition to this result may be detected, there has never been any decision squarely to the contrary, for even those who felt disinclined to agree with this result have appreciated that it could not be otherwise unless the general doctrine against cutting short the equity of redemption should be held for naught. However, this particular form of the general problem must be considered as finally settled by a recent decision of the House of Lords, Samuel *v.* Jarrah Timber Corporation.[2] In that case the mortgagee of debenture stock from a corporation was given the option to purchase the whole or any part of such stock at forty per cent at any time. In redemption proceedings brought by the corporation it was held that although Samuel had claimed his option before repayment was offered, it was all in vain, as the option was void, Lord Lindley saying:

> "The doctrine 'once a mortgage always a mortgage' means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid, and is inconsistent with the transaction being a mortgage." [3]

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[1] 11 Ir. Ch. 367.

[2] [1904] A. C. 323.

[3] There are enough cases with these facts to show that such stipulations furnish the clearest sort of fetter upon the equity of redemption. The following cases are

V.

It has been assumed thus far that once the court is convinced that the mortgagor is left by the mortgage with no clog upon his equity of redemption, he is then free to enter into such bargains as he pleases for the disposal of his equity of redemption. But this is not altogether true; for the court still watches transactions between the mortgagor and mortgagee with a suspicious eye. The mere fact that there has been a formal arrangement subsequently made by which the mortgagor has purported to convey his interest to the mortgagee does not in itself satisfy the court, it will scrutinize the transaction to determine for itself whether or not it will permit the release of the equity of redemption, which the parties have given out as accomplished.

To take the simpler case first, if the court discovers that the conveyance from the mortgagor to the mortgagee was made without consideration, the original indebtedness still remaining, it will hold that the transaction can have no other meaning than that the mortgagee is given the absolute title as further security. Therefore the court will declare that the mortgage situation still persists; for the court has held in countless cases that where an absolute deed is found in association with continued indebtedness there is upon fundamental principles a mortgage in substance with the corresponding right of redemption, notwithstanding any bargain by which the parties may attempt to avoid the full effects of this consequence. In Pugh *v.* Davis,[1] the leading American case of this particular sort, the United States Supreme Court said by Mr. Justice Field:

> "It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or

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worth examination in addition to the two just quoted: Price *v.* Perrie, 2 Freem. 258 (option to purchase on default); Willett *v.* Winnell, 1 Vern. 488 (mortgage for £200, provision for purchase by the mortgagee after default on payment of £78); Obry *v.* Trigg, 9 Mod. 2 (query in case of sale of the equity at any time, mortgagee to have preëmption); Kanarau *v.* Kuttorly, I. R. 21 Mad. 110 (provision for sale of the property to the mortgagee in case of default at price to be then fixed by arbitrators); Turpie *v.* Lowe, 114 Ind. 37 (mortgagee given right to retain property in case of default by paying fair cash value).

[1] 96 U. S. 332.

abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage."[1]

When it appears that consideration has been paid by the mortgagee to the mortgagor for the release of the equity of redemption, then the principles of mortgage law that have just been exemplified do not apply to the situation. Indeed, the concern of equity is that, notwithstanding that he has made a mortgage, the borrower shall remain the owner of his estate, the title being in the mortgagee simply for security. Now, ownership in full includes the power of disposition; and so the general rule is that the mortgagor is free to sell the equity of redemption which the court creates for him to any one he pleases, including the mortgagee. However, there is enough of a fiduciary relation between mortgagor and mortgagee to lead equity to scrutinize the transaction to determine whether the consideration is adequate. The leading American case for this, Villa *v.* Rodriguez, is again in the United States Supreme Court.[2] The actual facts in that case, to be sure, were peculiarly strong, for the mortgagee was a scoundrelly brother and the mortgagor was a widow in financial straits. But this language of Mr. Justice Swayne was of general application:

"The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth."[3]

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1 The decision of this case depends upon the doctrine, now established by countless cases, that even an absolute transfer for security of a debt may be shown to be a mortgage with a consequent equity of redemption. Good illustrations of this rule selected at random are: Lincoln *v.* Wright, 4 De G. & J. 16; *Re* Duke of Marlborough, [1894] 2 Ch. 133; Miller *v.* Thomas, 14 Ill. 428; Linnell *v.* Lyford, 72 Me. 280; Cullen *v.* Cary, 146 Mass. 50; Strong *v.* Stewart, 4 Johns. Ch. (N. Y.) 167.

2 12 Wall. 323.

3 There is some dissent from this view that there is such a relation between mortgagor and mortgagee that equity may set aside an unfair bargain for the extinguishment of the redemption. See McMillan & Son *v.* Jewett, 85 Ala. 476; Brown *v.* Gaffney, 28 Ill. 149; Trull *v.* Skinner, 17 Pick. (Mass.) 213; Shouler *v.* Bonander, 80 Mich. 531; to the effect that there may be such interference. But see De Martin *v.* Phelan, 115 Cal. 538; Pritchard *v.* Elton, 38 Conn. 434, which are rather opposed.

VI.

This general distinction accepted in all the cases discussed in this article — that an agreement which is part of the mortgage transaction may be void, while if in an entirely separate dealing it will be valid — has seemed so strange to some observers that it is at times made the basis of an attack upon the doctrine itself. But the writer trusts that in the course of this discussion it will appear that this is a proper distinction in all situations. The concern of a court of equity is chiefly that an equity of redemption shall be created in the property mortgaged, free from all limitations. Once it is satisfied as to that, as has been seen, the court usually leaves mortgagor and mortgagee to deal with each other as they see fit, if in good faith.

Thus even an executory agreement looking to the extinguishment of the equity of redemption on condition will be held valid if entered into by mortgagor and mortgagee at a time subsequent to the mortgage transaction. In Wynkoop *v.* Cowing,[1] a case of this sort, Mr. Justice Breese said:

> "Although parties may not at the same time, and by the same instrument, stipulate for converting a loan and mortgage into an absolute purchase upon the happening of a subsequent event, yet it is also true that a subsequent *bona fide* and fair agreement for the purchase and extinguishment of the equity of redemption for a valuable consideration, will be sustained, and such this appears to have been."[2]

A far more difficult case, but still not altogether impossible, is one like Gleason's Administratrix *v.* Burke.[3] In that case the contention was that an agreement made contemporaneously with the mortgage was a distinct bargain. The facts really bore out that contention, for although the whole lot was assigned to the lender on the occasion of the loan of the $1500 and there was a provision that upon the repayment of the sum a twenty-five foot strip in the rear of the lot should be retained by the mortgagee, — still the evidence sufficiently showed that there was independent bargaining as to the rear strip, on which the mortgagee was to erect

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[1] 21 Ill. 570.

[2] Upon similar principles it was held in Reeve *v.* Lisle, [1902] A. C. 461, that a mortgagor and mortgagee may by an independent transaction subsequent to the mortgage make a valid agreement which gives the mortgagee the option of purchasing the mortgaged property.

[3] 20 N. J. Eq. 300.

a building, as the mortgagor regarded it as adding to the value of the retained premises. And the Chancellor, although properly suspicious, finally conceded:

"But a borrower and lender may lawfully make other bargains even relating to the mortgaged property, and if they are not in consideration of the loan, or the condition of its being made, and are otherwise lawful, they may be enforced." [1]

VII.

Thus far the cases have been all of the type where the extinguishment of the equity of redemption is threatened, and for these it is comparatively easy to state a principle. It is because a clog upon the redemption may still leave the equity in existence that it is really difficult to state the limits of the doctrine. As the leading case upon the whole subject has not yet been stated, it may not have been appreciated how wide the problem is. That is the early case of Jennings *v.* Ward,[2] the pregnant report of which follows:

"The defendant Ward lends money to Neale, the Groom Porter, to carry on his buildings in Cock and Pye fields, and took a mortgage from him to secure £16,000, with interest at 6 per cent, and in another deed, executed at the same time, took a covenant from Neale, that he should convey to the defendant, if he thought fit, ground rents to the value of £16,000, at the rate of twenty years' purchase. The bill being to redeem, the defendant insisted on that agreement; but the Master of the Rolls decreed a redemption, on payment of principal, interest, and costs, without regard to that agreement; but set aside the same as unconscionable. A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement."

Ever since this case our law has had to deal with the recognized rule that a mortgagee may not stipulate at the time of the mortgage for such advantage as will constitute a clog on the equity of redemption. And this rule prevails to some extent wherever the English notion of the mortgage transaction is found. Even in British India the money lenders have been compelled at length

[1] In Earpe *v.* Boothe, 24 Grat. (Va.) 368, it was held that where, in completing a purchase in which the borrower had an interest, the lender advanced the necessary funds, it could be agreed that forty acres of the tract the lender should have at an agreed price, the remainder of the land to be held in mortgage for the payment of the balance of the money.

[2] 2 Vern. 520.

to submit to it. One of the many recent cases from those parts is Sheo Shanker *v.* Parma Mahton.[1] In that case there was an agreement between mortgagor and mortgagee that until another sum not secured was paid the property should not be redeemed. The English decisions were considered by the court as binding upon them, and they gave redemption in spite of the agreement made. "As we understand it," they said, "the rule forbids the enforcement of any stipulation which puts a hindrance or stay in the way of the mortgagor in the exercise of his right to redeem."[2]

VIII.

It must be admitted that a certain prejudice against all collateral advantages giving profit to the mortgagee by virtue of his position is present in the earlier cases in addition to the more fundamental objection to all arrangements clogging the equity of redemption. This has led to many decisions in which the principle against restraint of the equity of redemption was pressed further than this rule in itself should go. Doubtless it is true that if there is such real overreaching in the negotiation of the mortgage as to make it an unconscionable bargain, courts of equity may give relief. Moreover, courts of equity may treat a mortgagee, especially a mortgagee in possession, to some extent as a trustee and as such disabled from taking collateral profits. But it has tended to confuse the issue to speak of arrangements really set aside as in violation of these principles of equity as void as clogs upon the equity of redemption by reason of collateral advantage.

Thus cases like Godfrey *v.* Watson[3] are cited as opposed to restriction upon the equity of redemption, yet all the Lord Chancellor said in that case was that —

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[1] I. R. 26 Allahabad Series 559.

[2] Other cases of collateral advantage are worth noting: Broad *v.* Selfe, 11 Wkly. Rep. 1036 (mortgagee to have 5% additional on the value of the property, whether or not the mortgagor sold it during the pendency of the mortgage); Chapple *v.* Mahon, Ir. R. 5 Eq. 225 (provision for a bonus to the mortgagee beyond interest in case the mortgagor paid off the loan within a certain time); Browne *v.* Ryan, [1901] 2 Ir. 653 (mortgagor agreed to give the sale of the land to the mortgagee at 5% commission; if the estate was sold through another auctioneer the mortgagee was to have 5% just the same); Hyndeman *v.* Hyndeman, 19 Vt. 9 (a mortgage of land to secure a loan of $600; provision that the land should be sold if possible, the mortgagee to have $800 of the proceeds in satisfaction). In all of these cases the provisions abstracted were held void.

[3] 3 Atk. 517.

"a mortgagee shall not be allowed for his trouble in receiving the rents of the estate himself, but if an estate lies at such a distance from the place of his residence, as he must have employed a bailiff, if it had been his own, he shall then be allowed such sums as he has paid to a bailiff, to receive the rents of this estate." [1]

Again, if a court of equity sees promises extorted from a mortgagor by the occasion of the borrowing when he is in the power of the mortgagee, they will relieve against them as unconscionable. This feeling has been so fostered by usury statutes that it long persists their repeal, as indeed it is proper in extreme cases that it should. Most of the American cases, strangely enough, really approximate no nearer to this phase of the problem of the clog on the equity of redemption than this. Uhlfelder *v.* Carter's Administrator,[2] sometimes cited in this connection, was a case where the mortgage provided that the mortgagor, a small farmer, should deliver to the mortgagees for sale and storage some fifty bales of cotton, or, in the event of a failure to so deliver, to pay as liquidated damages one month's storage and an estimated commission of two and one-half per cent. In condemning this scheme Chief Justice Bicknell said:

"The mortgagees, in the light of the facts, were, under the guise of a stipulation for the future delivery of cotton for storage and sale, but stipulating for the payment, in addition to lawful interest on the debt due them, of the additional profit of the usual charges for storage, and the commission on the sales." [3]

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[1] Other cases where the principle against clog on the equity of redemption has been forced unduly may be noted here: *In re* Roberts, 43 Ch. D. 52 (a mortgagee who was a solicitor denied usual compensation for preparing the mortgage); Field *v.* Hopkins, 44 Ch. D. 524 (a mortgagee who was an appraiser was denied usual compensation for valuation of the premises). But if a mortgagee receives a collateral advantage in some other character than as mortgagee, he is not now compelled to account therefor. White *v.* London Brewery Co., 42 Ch. D. 237 (mortgagee, a brewer, profiting by selling beer to mortgagor, a publican); Rogers *v.* Herron, 92 Ill. 593 (mortgagee receiving rents and profits as vendee).

[2] 64 Ala. 527.

[3] It may be as well to cite some other American cases of this sort. In the cases first cited the stipulations noted were held invalid. Kiddermaster *v.* Brossard, 105 Mich. 219 (stipulation for $40 as attorney's fee); Northwestern M. L. Ins. Co. *v.* Butler, 57 Neb. 198 (provision for expenses incurred in preparing for foreclosure); Vilas *v.* McBride, 62 Hun (N. Y.) 324 (agreement that mortgagee of hotel property should have free the manure from the stables); Dailey *v.* Maitland, 88 Pa. St. 384 (5% additional as attorney's fee). The cases next cited, however, hold such provisions valid: Clauson *v.* Munson, 55 Ill. 394 (attorney's fee); Tholen *v.* Duffy, 7 Kan. 405 (attorney's fee).

IX.

To a very considerable extent, however, this former vague principle against mere additional advantage to the mortgagee in consideration for the loan of his money must be regarded as obsolescent if not obsolete. Wherever usury laws are repealed surely this opposition to merely unusual return for the use of money must gradually die out. Indeed, it is many years since the English court in Potter *v.* Edwards[1] compelled a mortgagor who had promised to pay £1000 in return for a present advance of £700 to pay the £1000 in order to redeem his premises. This does not mean that if £1000 were promised in a year for a present advance of £100 that the bargain would stand in a court of equity, which of course has general principles against all unconscionability, whether in mortgage transactions or elsewhere.[2]

That this is quite in accordance with modern business ideas is shown in the very recent case of Buchanan *v.* Harvie,[3] where for an advance of £3500, made on security of problematical value, £6000 in cash and £5000 in shares were promised; and it was held that redemption would only be granted upon the terms of the full performance of the whole promise. To quote the language of Justice Barker:

> "The difference between the sum loaned and the sum secured may, and, in fact, does seem large even where the security is as speculative as the evidence shews this was. And, if the validity of the transaction were being impeached on the ground of oppression or surprise or any similar ground, this difference would be an important factor in the determination of that question. But no such defense is set up here, and if it were, there is no sufficient evidence to support it."[4]

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1 26 L. J. Ch. 468.

2 Two of the many cases where mortgage transactions have been set aside as plainly unconscionable are: Chambers *v.* Baldwin, 9 Ves. 254 (provision that defaulted interest should be added to principal); Fulthorpe *v.* Foster, 1 Vern. 477 (the Bristol bargain — the principal to be repaid in instalments, the interest payments to continue at the original figure).

3 3 N. Brunsw. Eq. 61.

4 It will be sufficient to cite two recent cases by way of further illustration: Maitland *v.* Upjohn, 41 Ch. D. 126 (bonuses deducted from advances made on speculative security, *held* that the principal must be repaid without deducting such discounts); Maxwell *v.* Tepping, [1903] 1 Ir. 498 (a new deal by which further sums were advanced by a mortgagee to a mortgagor upon the terms that the rate of interest should be increased by 1%, *held* not to constitute a clog on the equity of redemption).

X.

It must be realized, therefore, that according to the more modern notions the mere fact of some collateral advantage is not fatal in itself unless it can be shown to be a fetter upon the equity of redemption as well. The ruling case to this effect is Biggs *v.* Hoddinott.[1] This was the case of a mortgage of his hotel by the defendant Hoddinott to the plaintiff Biggs, a brewer, to run five years, with a covenant by the mortgagor that during the continuance of the security he would deal exclusively with the mortgagee for all malt liquors sold on the mortgaged premises. The mortgagor having ceased to purchase beer of the mortgagee, he moved for an injunction, which was granted. In the Court of Appeal Lord Lindley, then Master of the Rolls, stated the modern law thus:

"The proposition stated in Jennings *v.* Ward is too wide. If properly guarded, it is good law and good sense. A mortgage is regarded as a security for money, and the mortgagor can always redeem on payment of principal, interest and costs; and no bargain preventing such redemption is valid, nor will unconscionable bargains be enforced. There is no case where collateral advantages have been disallowed which does not come under one of these two heads. To say that to require such a covenant as that now in question is unconscionable is asking us to lay down a proposition which would shock any business man, and we are not driven to it by authority." [3]

[1] [1898] 2 Ch. 307.

[2] 2 Vern. 520.

[3] Another point was urged unsuccessfully in Biggs *v.* Hoddinott, *supra,* which seems a curious contention in modern times. In the first enthusiasm for redemption it seems to have been thought that an agreement between mortgagor and mortgagee that the loan was to run for some extended period, no reconveyance to be made until a repayment on that day, might be a clog upon the equity of redemption. Talbot *v.* Braddel, 1 Vern. 393 (thirty years); Cowdry *v.* Day, 1 Giff. 316 (twenty years). The only truth there can be in this notion is that the circumstances including such postponement may be so extraordinary as to cause the whole arrangement to be considered unconscionable. Otherwise, until the passing of the legal right to redeem created by the parties, there is no reason for the interposition of the equity of redemption. And it should be said that the doctrine finds little favor in the modern English cases. See Brown *v.* Cole, 14 Sim. 427; Guardians of the Poor *v.* Metropolitan Life Assurance Soc., [1897] A. C. 647. No American case, so far as the writer knows, has ever considered mere length of time as inconsistent with a mortgage transaction; indeed we have countless corporate mortgages to secure bonds ranging in duration from twenty to one thousand years. See Philadelphia & R. Ry. Co's App., 4 Am. & Eng. Ry. Cas. 118. Moreover it seems plain that mere stipulation for a long investment is not

Emboldened by this success, counsel brought to court another case much more complicated; and in Santley *v.* Wilde [1] a clever scheme was presented for approval. The sum of £2000 was loaned to the lessee of a theatre, and the borrower agreed not only to repay that sum with interest in five years, but also to give the lender one-third of the net profits during the term of the lease. And the mortgage executed upon the lease secured by its terms not only the repayment of the debt and interest in the five years, but the payment of one-third of the net profits for the whole ten years. It would seem that this device was too plain an evasion of the rule to pass examination, but so ably was the case argued to the Court of Appeal that they held the whole transaction valid, Lord Lindley making this dubious distinction:

> "Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that once a mortgage always a mortgage; but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation the payment or perperformance of which is to be secured is a clog or fetter within the rule."

If Biggs *v.* Hoddinott and Santley *v.* Wilde had both persisted as accepted law for any time, there would have been an end of the greater part of the accepted doctrine against the clog on the equity of redemption; and indeed many acclaimed its downfall as wholly in accordance with modern enfranchisement. But the doctrine against fettering the equity of redemption has such firm foundations in mortgage law that it was not shaken by these decisions; and as will be seen presently, while it is generally supposed that Biggs *v.* Hoddinott is good law, Santley *v.* Wilde is distinctly overruled. And the writer believes that this differentiation probably is good law for modern conditions. The real test in the matter is not whether the mortgagor is subjected to various burdens during the currency of the mortgage, unless indeed the price extorted from him for the hire of the money is really unconscionable; but the true inquiry, it is submitted, is whether after repayment

an improper advantage for the mortgagee to take. The only possible legal objection that can arise to long-time mortgages would seem to come from the rule against remoteness, to which, probably, they form a necessary exception. See Gray, Rule Perp., 2 ed., §§ 562–570.

[1] [1899] 2 Ch. 474.

of his loan the mortgagor is free from interference with his enjoyment again of full ownership.

XI.

We come at length to the two recent cases in the House of Lords in which this whole matter was threshed out to a conclusion which should be accepted as final wherever our law prevails. In Noakes & Co., Ltd. *v.* Rice[1] the facts were that a mortgage upon a lease of a public house made by the publican to his brewers provided in usual form that when the borrower should repay all sums due to the lender the mortgaged premises should be reconveyed, with the further stipulation so framed as to run with the land that, whether any money should or should not be owing on the security, all malt liquors sold upon the premises should be bought of the brewers. When the publican came with his bill to redeem, all the English courts in succession held this stipulation void. And indeed this would seem to be the typical case of a clog on the equity, wherever this rule is developed in full, a fetter which is designed to outlast redemption. To quote the pithy statement of Lord Davey:

> "Once a mortgage always a mortgage, and nothing but a mortgage. The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor who has paid principal, interest, and costs, from getting back his mortgaged property in the condition in which he parted with it."

Yet doubts were left unsettled by Noakes *v.* Rice because its facts made out so strong a case of clog on the equity of redemption, by reason of the fact that it was assumed by most of the judges, though not all, that the covenant if valid would create a hold upon the property itself even in the hands of a vendee. But in Bradley *v.* Carrett,[2] in the next year, the House of Lords had to deal with a case of a covenant in regard to the property designed to outlast redemption, which could not be said to be specifically enforceable. A holder of shares in a tea company mortgaged the shares to secure a loan and agreed to use his best endeavors to secure that "always thereafter" the mortgagee should have the sale of all the company's teas as broker, and, in the event of any of the company's teas being sold otherwise than through the mortgagee, to pay him the amount of the commission he would

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[1] [1902] A. C. 24.

[2] [1903] A. C. 253.

have earned if the teas had been sold through him. After the mortgage was paid off the company employed other brokers, and this was a suit for breach of covenant. The lower courts held the agreement valid, but the House of Lords reversed them upon grounds thus stated by Lord Macnaghten:

"My Lords, I do not think it is necessary that there should be any hold upon the property, direct or indirect. I think, as I ventured to say in Noakes *v.* Rice, that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. And I think your Lordships gave sanction to that proposition when you approved the decision in the Irish case of Browne *v.* Ryan.[1] Can you impose on the equity of redemption a fetter operating indirectly, when you cannot, as it is admitted, impose a fetter which operates directly? My Lords, I should have thought that that question answered itself — you cannot do indirectly that which you must not do directly."

The meaning of these decisions should be obvious, whether or not one agrees with the policy that dictates them. In order to have that which is forbidden as a clog on the equity of redemption we must have this situation created, that the debtor who has mortgaged his property will not upon repayment to his creditor emerge from the transaction as free in his ownership as he was before. That he has to pay high for his money is not enough, so long as by the repayment of everything due, every incumbrance that there is upon his property will be wiped off. And there is in the eye of equity a fetter upon his property if the covenant he has been induced to make will, after redemption, hamper him in the full enjoyment of his property or hinder him in the disposition of it. It is enough, that is, to constitute a clog upon the equity of redemption if the covenant will affect the mortgagor after redemption as an owner of the *res*.[2]

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1 [1901] 2 Ir. 653.

2 The law as thus settled in the beginning of the twentieth century seems to be nearly the same as the law at the beginning of the nineteenth century. There was a correspondingly large number of decisions within a few years about that time, most of them concerning the validity of the terms of the mortgages of West Indian estates to London factors. In Bunbury *v.* Walker, 1 Jac. & W. 225, it was properly held that an agreement that the lender should be the consignee of the borrower during the currency of the mortgage was valid, and the warning was properly given that a covenant of this sort was unenforceable in so far as it attempted to secure to the lender the position of consignee after repayment of the debt. Cox *v.* Champney, Jac. 576, has a dictum to the same effect, making the same distinction. To be sure, Chambers *v.* Goodwin, 9 Ves. 254, suggested that such collateral profits could not be taken, but that was a case of

XII.

Considered in a broad way, this rule against clogging the equity of redemption is one of the many instances of the setting aside of the deliberate bargains of the parties upon the ground that they are contrary to the policy of the courts. The right of men to hold such contracts as they can get is subject to many limitations imposed for the common good. But especially when it is a case, as this one is, where the contract of the parties comes into real opposition with a fundamental doctrine, its fate is certain at the hands of a court vigilant to protect its own. Since it is all a matter of policy, it cannot be expected that all men will agree as to the propriety of such interference. But to the writer the doctrine against the clog on the equity of redemption seems one of the striking examples of the great truth that the ethical standard of our law is often higher than the average morality of the commercial community.

Bruce Wyman.

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mortgagee in possession, as was Leith *v.* Irvine, 1 Myl. & K. 277, and the court treated a mortgagee in possession to that extent as a trustee in both cases.